

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

BALTIMORE & OHIO RAILROAD COMPANY,	}	No. 99.
appellant,		
v.		
THE UNITED STATES.		

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This appeal is from a judgment of the Court of Claims sustaining the demurrer of the United States to the appellant's petition.

On November 30, 1920, the appellant filed in the Court of Claims its petition setting forth in substance the following facts as constituting a cause of action against the United States:

On October 29, 1915, it purchased and affixed to 13 certain deeds of conveyance, internal-revenue stamps to the amount of \$55,158 pursuant to the act of October 22, 1914, 38 Stat. 745, ch. 331. These deeds were dated October 1, 1915, and it is alleged that they were given without any valuable consideration passing from the grantor companies to the grantee company, the petitioner. The grantor companies were subsidiaries of the petitioner and the object of the deeds was to enable the petitioner to

mortgage its entire property to meet its urgent needs (p. 1).

On February 11, 1915—that is, more than seven months prior to the date of the deeds in question—the claimant filed in the Bureau of Internal Revenue what it calls in the petition “its informal claim in abatement,” in which it set forth in detail three of the deeds of conveyance, stating that no stamp tax should apply to these tendered deeds and asked for a ruling of the commissioner (p. 2). The document characterized as an “informal claim in abatement” is not set forth in the petition. The commissioner, by letter of February 25, 1915, “rejected the informal claim in abatement and held that the stamp tax applied.” Thereupon the claimant paid the stamp tax on the 3 deeds submitted to the commissioner and also upon the other 10 deeds (p. 3).

Nothing more was done about the matter until September 22, 1919—that is, for about four years. On September 22, 1919, the petitioner filed a claim for refund of these stamp taxes, basing its claim upon a ruling of the Acting Commissioner of Internal Revenue, dated April 18, 1919, in a letter to the Corporation Trust Co. of New York, in which he stated: “You are advised that the deeds of conveyance in question are not subject to stamp tax under subdivision 7, Schedule A, act of 1918, provided that no valuable consideration passed from the grantee to the grantor.”

On October 2, 1919, the Commissioner of Internal Revenue rejected this claim upon the ground that

the stamps in question having been purchased in 1915, were barred from redemption by the two years' limitation imposed by the act of May 12, 1900 (31 Stat. 177), (p. 2).

On December 22, 1919, the petitioner wrote to the Commissioner of Internal Revenue asking for a hearing and, as stated in the petition, "vigorously dissenting from his action rejecting its claim" and stating that the two years' limitation provided in the act mentioned had no application to its claim for refund (p. 2).

The hearing was granted, at which the petitioner contended and now contends "that its informal claim in abatement has been properly amended and perfected and duly presented under the internal-revenue laws and the regulations of the Bureau of Internal Revenue." The commissioner disallowed the claim, to which ruling the petitioner protested on December 22, 1919, and March 12, 1920 (p. 3), and these protests being of no avail, this suit was begun.

In sustaining the demurrer of the United States, the Court of Claims held that the commissioner was right in rejecting the claim; that the claim was barred by the statute of limitations; that the contention made by the claimant that its claim for refund filed in 1919 was nothing more than an amendment of its so-called informal claim for abatement filed in 1915 which was by this belated process converted into a primary claim for a refund, was without merit. The statutory provisions involved are the following:

The Statutory Provisions.

R. S., section 3220, as amended by section 1316-a, act of February 24, 1919, provides:

The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section.

R. S., section 3226 (Comp. Stat., sec. 5949), provides:

No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have

been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner, at any time within the period limited in the next section.

R. S., section 3227 (Comp. Stat., sec. 5950), provides:

No suit or proceeding for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: * * *.

R. S., section 3228 (Comp. Stat., sec. 5951), provides:

All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two,

may be presented to the commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date.

The act of May 12, 1900, as amended by the act of June 30, 1902 (Comp. Stat., sec. 6346), provides:

6346. *Redemption of spoiled stamps, etc.*—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps, issued under authority of law, to denote the payment of any internal-revenue tax, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which through mistake may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected. * * * *Provided further*, That no claim for the redemption of or allowance for stamps shall be allowed unless presented within two years after the purchase of said stamps from the Government, excepting documentary and proprietary stamps issued under the act of June thirteenth, eighteen hundred and ninety-eight, which stamps may be redeemed as hereinbefore authorized, upon presentation prior to the first day of July, nineteen hundred and four.

ARGUMENT.

On October 29, 1915, when the stamps were canceled, plaintiff's claim accrued, and that date marked the beginning of the time in which the plaintiff must do something in order to secure a refund of the amount paid for the stamps. The *claim* most certainly had accrued. If the plaintiff had already taken the steps necessary to perfect its cause of action, that cause of action had accrued and suit must have been begun within two years under section 3227 of the Revised Statutes, for the suit was one for the recovery of an internal-revenue tax alleged to have been erroneously or illegally assessed or collected. Upon the assumption that the cause of action was not yet complete and that something more must be done in order to permit the plaintiff to sue, a claim for refund must have been presented to the Commissioner of Internal Revenue within two years under section 3228 of the Revised Statutes. That section says that all claims for refund of any internal tax alleged to have been erroneously or illegally assessed or collected must be presented to the commissioner within two years "next after the cause of action accrued." The words in this section "cause of action" obviously mean the same as the word *claim*. The plaintiff did neither of these things nor did it make claim for allowance or redemption under the act of May 12, 1900, as amended. It neither presented a claim for refund nor brought suit, but waited for four years until some one more diligent had procured a ruling from the commissioner

which restored the plaintiff's hope of recovering the money, a hope which seems to have been abandoned four years before. Mindful of the limitations imposed by the law against claims against the United States, the plaintiff looked around for some means of avoiding what was apparently a hopeless case, and hit upon the expedient of trying to make the collector believe that a wholly new claim for refund could in some way be regarded as an amendment of his so-called informal claim submitted four years before. Neither the collector nor the Court of Claims, however, yielded to such a specious plea. The claim filed with the commissioner on September 22, 1919, can by no possible reasoning be treated as an amendment of an existing claim. During the four years there was no claim pending before the commissioner, and therefore there was nothing to amend. It must be remembered that these stamps were canceled on October 29, 1915. The transactions between the plaintiff and the Commissioner of Internal Revenue which constitute the informal claim took place in the month of February preceding. No letters or papers bearing upon these transactions are set forth in the petition and it is certainly informal pleading to designate a paper as "an informal claim for abatement" without setting it forth. It is said of this "informal claim" in appellant's brief (page 7, "Had it been on the regular form prescribed by the Bureau of Internal Revenue for a claim for abatement of taxes it could not have been more clearly shown and the protest made with more emphasis than was

set forth in the informal claim for abatement." This is a mere conclusion of the pleader. Enough is set forth, however, to make it apparent that some seven or eight months before these deeds were ready for execution, and while they were in course of preparation, the plaintiff or its attorneys addressed a letter to the Commissioner of Internal Revenue asking for a ruling on the question of the necessity of attaching revenue stamps to the proposed deeds and inclosing three specimen deeds. The commissioner notified them two weeks later that the stamps must be affixed to the deeds. When the deeds were ready for execution they were duly stamped in accordance with this ruling. That transaction then became a closed incident. There was nothing further to be done except to do what the law required them to do if they desired to obtain from the Government a refund of what they had paid for the stamps; that is, to file a claim for refund with the Commissioner of Internal Revenue. This they did not do, and to call the formal and proper claim for refund which they filed four years later, after they found that some diligent person had not been idle meanwhile, an "amendment," is to give to the word a meaning not only contrary to the commonly understood meaning of such language but is to destroy the wholesome provisions of the law requiring claims against the United States to be presented seasonably and, if rejected, to be sued upon promptly. As the Court of Claims said in its opinion:

The widest latitude has been allowed the vigilant in the matter of amendment of claims for refund of illegal taxes, but no authority has been cited wherein the courts have gone to the extreme, no matter how apparent the equities of the situation, in sustaining a claim after a long repose and which would doubtless have continued in such a state save for the persistence and vigilance of a later and another claimant, the ruling in whose case affords prospects of recovery for an abandoned claim.

To sustain the contention of the plaintiff in this case would be, in effect, to hold that the statute of limitations could never run against such claims if, before paying the tax a taxpayer asked and obtained from the Commissioner of Internal Revenue a ruling which was against him. If after doing that and paying the tax he could wait four years, it would be just as logical to say that he could wait any number of years and then file a claim for refund and call it an amendment of his original letter of inquiry. The statutes of the United States can not be given any such loose interpretation. It is obvious that a claim for refund can not be made until after the tax has been paid and when the statute says that the claim for refund must be made, it means literally what its words imply.

Rock Island, etc., R. R. Co. v. United States,
254 U. S. 141.

Kings Co. Savings Institution v. Blair, 116
U. S. 200.

In the case of *Rock Island, etc., R. R. Co. v. United States*, 254 U. S. 141, a tax was assessed under the act of August 5, 1909, and after the tax was assessed a claim for an abatement was sent to the Commissioner of Internal Revenue in July, 1913. On December 18 of the same year the application was rejected, whereupon the claimant paid the tax with interest and a penalty. So far as appears, there was no sign of protest at the time of payment and after that nothing was done to secure a repayment of the tax. The Court of Claims dismissed the petition, and this court affirmed its judgment.

This court, Mr. Justice Holmes writing, said:

Regulations of the Secretary established a procedure and a form to be used in applications for abatement of taxes, and distinct ones for claims for refunding them. The claimant took the first step but not the last.

After quoting sections 3226 and 3220 of the Revised Statutes, the court continued:

It is urged that the "appeal" to him to remit made a second appeal to him to refund an idle act and satisfied the requirement of § 3226. Decisions to that effect in suits against a collector are cited, the latest being *Loomis v. Wattles*, 266 Fed. Rep. 876. But the words "on appeal to him made" mean, of course, on appeal in respect of the relief sought on appeal, to refund, if refunding is what he is asked to do. The words of § 3226 also must be taken to mean an appeal after payment, especially in view of § 3228, requiring claims

of this sort to be presented to the commissioner within two years after the cause of action accrued. So that the question is of reading an implied exception into the rule as expressed, when substantially the same objection to the assessment has been urged at an earlier stage.

Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with. *Lex non praecipit inutilia* (Co. Litt. 127b) expresses rather an ideal than an accomplished fact. But in this case we can not pronounce the second appeal a mere form. On appeal a judge sometimes concurs in a reversal of his decision below. It is possible, as suggested by the Court of Claims, that the second appeal may be heard by a different person. At all events, the words are there in the statute and the regulations, and the court is of opinion that they mark the conditions of the claimant's right. See *Kings County Sav. Inst. v. Blair*, 116 U. S. 200. It is unnecessary to consider other objections that the claimant would have to meet before it could recover upon this claim.

The case of *Kings County Savings Institution v. Blair*, 116 U. S. 200, was an action brought against a collector of internal revenue for taxes claimed to have been illegally collected. The Circuit Court gave judgment for the defendant and upon writ of error to this court the judgment was affirmed. The

defense pleaded was that the claim for refund of the tax was not presented to the Commissioner of Internal Revenue within two years after the claim had accrued.

The court quoted from the regulations then in force showing that the claims for refund of taxes must be made upon form 46; that all the facts relied upon in support of the claim should be clearly set forth under oath; that the claims should be supported by the certificate of the assistant assessor of the proper division and by the certificate of the assessor and collector; that the affidavit should state the business in which the claimant was engaged, when and by what assessor he was assessed, the amount of the tax and when he paid it and to what collector, the reason for the erroneous assessment, and that he had not theretofore presented any claim for the refunding of the tax or any part of it. The court refers to the form of the deputy collector's certificate to be indorsed on the claimant's affidavit to the effect that he had carefully investigated the facts set out in the affidavit and believe the statement in all respects to be true. Then follows the form of the collector's certificate showing, among other things, that upon personal examination he found a certain sum, naming the amount reported against the claimant, giving the page and number of the list and the number and date of the form where it was to be found, and that the same was paid to him on a certain day and was included in his aggregate receipt

for said list. The court regarded these regulations as of importance and said:

All the safeguards prescribed by the Secretary of the Treasury for the protection of the public interest, in his regulations respecting claims for the refunding of taxes, have been disregarded. There has been no claim whatever in the sense of the law.

After quoting sections 3220 and 3228 of the Revised Statutes, the court says:

The contention of the plaintiff in error, therefore, amounts to this: That a protest upon its return for taxation against the requirements of the form on which the return is made, accompanied by an amended return, made out according to the plaintiff's construction of the law, is such a claim to the Commissioner of Internal Revenue for the refunding of a tax illegally collected, as is required by the law and the regulations of the Secretary of the Treasury.

We think there is no ground for this contention to rest on. No claim for the refunding of taxes can be made according to law and the regulations until after the taxes have been paid. It is not pretended that since the payment of the tax by the plaintiff any one of the steps required by the law and regulations to make an effectual claim for the refunding of the tax has been taken. All the safeguards prescribed by the Secretary of the Treasury for the protection of the public interests, in his regulations respecting claims

for the refunding of taxes, have been disregarded. There has been no claim whatever in the sense of the law.

In our opinion no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law. When the law says the claim must be presented within two years, the implication is that unless so presented the right to demand the repayment of the tax is lost, and the commissioner has no authority to refund it; and of course the right of suit is gone. We regard the presentation of the claims to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the Government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the commissioner within the time and in the manner pointed out by law and relief has been denied him.

The regulations in force at the time the tax in the present case was paid were substantially the same, and Form 46, upon which claims for a refund were required to be made by the regulations, was also substantially the same. And in addition to the matters referred to by the court in the *Kings Co. Savings Institution Case*, they required in the case of a claim for refunding an amount paid for stamps, a certificate by the collector of the purchase of the stamps. See Regulations No. 14, revised 1911. It

is quite apparent, therefore, that what the plaintiff in this case did in the year 1915 was in no sense a compliance with any of the provisions of law respecting refund of taxes. In the first place no such claim can be made until after the tax has been paid. There is nothing to show that the Commissioner of Internal Revenue ever knew that the stamps had been bought until the claim for refund was made in the year 1919. Of course, the commissioner may very properly disregard a mere informality and permit an amendment where the original claim in some substantial way complied with the necessities of the case, but, where the first intimation that a tax claimed to be erroneous has in fact been paid is presented to the commissioner four years after the tax has been paid, it must be obvious that such claim is the only claim which by any fair construction of law and the regulations can be considered as a request or demand to the commissioner for the refunding of the tax. It is the first claim upon which the commissioner could set in motion the machinery of his office to check it up for the purpose of rendering a decision, and the law says that this must be done within two years. Plainly nothing can be regarded as a claim for a refund which does not at least inform the commissioner that money has been paid to the United States and that the person who paid it asks for its return.

In the case at bar the claim for abatement, whether it be called formal or informal, amounted to nothing.

Even if it had been a formal claim for abatement on form 47, it would have been futile as the basis for a suit. It was admittedly made before the stamps were purchased, while the claim for refund can not be made until after the tax has been paid. It is the claim for *refund*, not a claim for *abatement*, which is a prerequisite to bringing suit. Something which was a nullity, of no legal effect at all, and having no possible application to the matter, can not, four years after, and after the statute of limitations has run, be revived and given legal effect as a condition precedent to the institution of a suit by calling it an amendment of what was done four years before and before any claim had arisen. The position of the plaintiff seems to be that while it was of no effect to establish a cause of action against the United States, upon which it could sue, nevertheless, it was perfectly effectual in preventing the statute of limitations from running. These two positions are wholly inconsistent. If the claim, though informal, be considered a claim for refund, then the suit should have been brought within two years. If the claim, though informal, was not in substance a claim for refund, then a proper claim for refund should have been filed within two years. If the claim for abatement of the tax amounted to a claim for a refund of the tax, this suit was not instituted within two years after the cause of action accrued. If the claim for an abatement of the tax did not amount to a claim for a

refund, then no claim for a refund was made within two years after the claim accrued.

For these reasons the judgment appealed from should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

OCTOBER, 1922.

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